
IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR.,
THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E.
HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN,
SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F.
PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B.
MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and
NATIONAL AMERICAN BANK, New Orleans, Co-Testa-
mentary Executors of the SUCCESSION OF SEYMOUR
WEISS, *Respondents*.

**PETITIONER'S REPLY TO RESPONDENTS' BRIEF
OPPOSING PETITION FOR WRIT OF CERTIORARI**

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August 10, 1979.

INDEX

	Page
RESTATEMENT OF THE CASE	1
Respondents' assertions that petitioner bought the government's gas	2
Respondents' claim of fraudulent concealment was rejected by the Louisiana courts	6
The Rate Schedule contains no provision for a severable payment for liquid hydrocarbons	8
There is no holding of estoppel in the Louisiana Supreme Court's opinion	12
Respondents' argument assumes, as did the Supreme Court of Louisiana, that if Respondents had filed with the FPC for rate changes, the Commission would have permitted the changes to become effective and would have authorized prices limited only by the area rate ceilings established by Opinions Nos. 607 and 607A	12
THE JUDGMENT OF THE SUPREME COURT OF LOUISIANA IS IN VIOLATION OF THE FILED RATE DOCTRINE	14
THE LOUISIANA COURTS DO NOT HAVE JURISDICTION OF THE QUESTIONS PRESENTED BY THIS LITIGATION ...	18
THE STATE COURT DECISIONS INFRINGE ON THE COMMISSION'S REGULATORY RESPONSIBILITY UNDER THE NATURAL GAS ACT	19
CONCLUSION	21

CASES:

Frank J. Hall v. Arkansas Louisiana Gas Co., 359 So.2d 255 (La. App. 1978)	4, 5-6, 6-7, 14
Frank J. Hall v. Arkansas Louisiana Gas Co., 368 So.2d 984 (La. S. Ct. 1979)	5, 7-8, 9-10, 14
Interstate Natural Gas Co. v. Mississippi River Fuel Corp., 220 La. 43, 55 So.2d 775 (1951)	4
Jordan v. Travelers Insurance Company, 257 La. 995, 245 So.2d 151 (1971)	5
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951)	16, 17
Northern Natural Gas Co. v. Kansas Corporation Com- mission, 372 U.S. 84 (1963)	17

STATUTES:

Natural Gas Act

52 Stat. 821, as amended, 15 U.S.C. § 717, et seq.	15, 17, 18, 20
§ 4, 15 U.S.C. § 717c	4, 12
§ 4(d), 15 U.S.C. § 717c(d)	9
Louisiana Civil Code Article 2040	7, 14

MISCELLANEOUS:

F.P.C. Statement of General Policy No. 61-1, 24 F.P.C. 818 (1960)	12
2 M. Planiol, Treatise on the Civil Law, No. 388A (La. St. L. Inst. transl. 1959)	7

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**PETITIONER'S REPLY TO RESPONDENTS' BRIEF
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RESTATEMENT OF THE CASE

Respondents' argument opposing the granting of certiorari in this case depends upon assumptions of fact which not only are not borne out by the decisions in the suit in the Louisiana courts, but in important particulars misstates the facts upon which the Louisiana courts based their judgments. We therefore restate the case, and the Louisiana courts' decisions, to the extent necessary to point out the errors of Respondents' argument.

**Respondents' Assertions That Petitioner Bought the
Government's Gas.**

Respondents or their predecessors entered into a gas sales agreement with Petitioner in 1952 which contained a "favored nation" provision which was to be activated "if . . . buyer should purchase from another party seller gas produced from the subject wells, or any other well or wells located in the Sligo Gas Field, at a higher price" ¹ The favored nation section of the contract went on to provide for giving consideration, in the comparison of prices, not only to the actual price stipulated for gas bought from another seller, but to other pertinent provisions of the contracts being compared, to determine whether the total price paid was actually comparable.

In 1961 Petitioner began producing gas from wells in the Sligo Field under a lease from the federal government which stipulated a 1/6 royalty, granting the government the option to take the gas either in kind or to take a money royalty to be calculated at a value which the government retained the right to fix. The official of the Department of the Interior responsible for the administration of the lease contract fixed a value per Mcf for the calculated amount of the residue gas from the wells on the government land and required Petitioner to pay 1/6 of that amount plus 1/6 of the total value of the hydrocarbon liquids extracted from the well stream delivered to Petitioner's nearby extraction plant, with an arbitrary allowance for the shrinkage of the gas due to removal of the liquefiable hydrocarbons contained in the well stream; no allowance was

¹ Section 8(D) of the gas sales contract, which is Respondents' Rate Schedule, is quoted beginning at the bottom of page 5 of the petition in No. 78-986.

made for the cost of operating the plant and extracting the liquids. Petitioner was also required by the government to process the raw condensate (oil) recovered at the well, which was carried to the plant in the pipelines carrying gas, again without any allowance for the cost of upgrading the condensate into salable products.

In 1961 one of Petitioner's officials raised the question whether the payment of royalty under the government lease amounted to the purchase of gas from another party seller, and the question, at the time it arose, was submitted to Petitioner's lawyers who gave a written opinion (contained in the Record) that the transaction did not involve a purchase of gas, and hence did not trigger Respondents' favored nation clause.

Respondents brought this suit in a Louisiana court of original jurisdiction in 1974, claiming that the payment of royalty to the federal government was a purchase from another party seller, triggering the favored nation clause, and sought a judgment for the difference in the payments received under the contract and the price alleged to have been paid to the federal government for gas. After Petitioner raised the defense that Respondents were claiming a price higher than the rate contained in their Rate Schedule (1952 contract) filed with the Federal Power Commission under the Natural Gas Act, Respondents amended their pleading to claim, as they said, damages for the breach of the contract based in part on the allegation that Petitioner had fraudulently and willfully concealed the facts from them.

The trial court made no finding on Respondents' allegations of fraudulent concealment (thus, under Louisiana law, denying them); held that under Louisiana law and the wording of the federal lease, the

royalty settlement was indeed a purchase of gas; granted Respondents recovery for gas sold by them beginning October 1, 1972, when they allegedly attained the status of "small producers" under Federal Power Commission regulations, and thus were excused from part of the filing requirements of the Natural Gas Act; and denied their recovery for the period 1961 to October, 1972, on the ground, under Section 4 of the Natural Gas Act and a Louisiana decision enforcing it,² that they could not recover for the rate increase which they did not file in the Power Commission. The Louisiana district court's opinion is in the Appendix to No. 78-986, at pages 24a-33a.

The Louisiana Court of Appeal reversed the district judge's ruling that a purchase of gas resulted from the royalty settlement, but affirmed the judgment in Respondents' favor on an interpretation hereinafter described, saying (No. 78-986, pp. 8a-9a),

"... Defendant contends the payments were royalty or rent being paid in its position of lessee and not a purchase because the United States had no title to any gas produced under the lease, it having continuously elected to accept a value royalty on the gas produced."

"We recognize that the theory of ownership and classification of lease royalty payments as rent as urged by defendant is in accord with the prevailing state law and federal decisions on this issue. [Citing Louisiana cases and one federal case.]"

The Louisiana Supreme Court denied Petitioner's application for a writ of certiorari (No. 78-986 App. .

² *Interstate Natural Gas Co. v. Mississippi River Fuel Corp.*, 220 La. 43, 55 So.2d 775 (1951), not cited in the opinion of the Supreme Court of Louisiana.

D, p. 22a) and granted Respondents' application for review (No. 78-986 App. E, p. 23a) of the judgment rejecting their claims for the period 1961-1972. Thus under Louisiana law, the Court of Appeal's judgment (under review here in No. 78-986) became the law of the case, as the Louisiana Supreme Court pointed out in footnote 4 to its opinion (No. 78-1789, App. A, p. 89a) as follows:

"362 So.2d 1120 (La. 1978). It is well settled that, when both parties apply for a writ of review, this court's denial of the application made by one of the parties constitutes our final determination upon the matters included therein. This court then will not pass a second time upon these matters at the hearing on review granted through the application of the other party. *Jordan v. Travelers Insurance Company*, 257 La. 995, 245 So.2d 151 (1971). Hence, any questions relating to the determinations made by the courts below that defendant breached the favored nations clause of its gas purchase contract with plaintiffs are not now before us."

Respondents' argument against the granting of certiorari in this case depends in substantial part upon their continual repetition of the statement that Petitioner purchased the government's gas at a higher price (their brief pp. 6, 7, 8, 15, 16, 19); and this in spite of the fact that the question is absolutely settled in this case that there was no purchase of gas involved in the royalty settlement. The Court of Appeal's judgment in Respondents' favor was based on a very broad interpretation of the phrase "purchase from another party seller" (No. 78-986 App. B, pp. 9a, 10a):

"We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the

term 'purchase from another party seller' relied on by defendant under the circumstances shown in this instance."

.

"The basic purpose of a price adjustment or Favored Nations clause is to protect a seller from discrimination by the pipe-line purchaser of gas under a long-term contract. [citing cases.] As it is intended for the protection of the seller, the clause should be broadly construed to effectively carry out this purpose. Therefore, to exclude the substantial amounts paid to the government by defendant as having any bearing on the price being paid for gas by defendant in this field because of a technical semantic classification of the payment as being rent royalty would render the protection intended to be afforded plaintiffs by a price adjustment clause meaningless."

**Respondents' Claim of Fraudulent Concealment Was
Rejected by the Louisiana Courts.**

Respondents' argument also relies strongly on their unsupported allegation that Petitioner wrongfully concealed, and gave them false information concerning, the payments to the federal government. See their brief, pages 6, 7, 8, 10, 17, 27, 29, 30, 33, 34, 35-37, 47, 48, 52. This ground of their argument also has been specifically struck down by the judgment and opinions of the Louisiana courts. As we have already noted, the trial court made no finding on the allegation and thus overruled it. The Court of Appeal (its opinion, No. 78-986 App. B, p. 14a) said:

"The trial court did not make a finding that defendant was guilty of fraudulent concealment, and we find the evidence is insufficient to support such an allegation."

"The evidence shows that in the fall of 1961 several of the officials of defendant were concerned that the royalty price negotiated with the United States might have the effect of activating the price adjustment clause of plaintiffs' contract. The question was submitted to defendant's attorneys who advised that payment of royalty would not have this legal effect. . . ."

The Supreme Court was even more positive in disclaiming any intention to base its holding that Petitioner had "prevented the fulfillment of the condition" (of filing with the Power Commission) on the allegations of bad faith and fraud. In its opinion, footnote 6 (No. 78-1789 App. A, p. 93a), it said:

"We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, '[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition.' 2 M. Planiol, *Treatise on the Civil Law*, No. 388 A (La. St. L. Inst. transl. 1959)."

and then later in its opinion the court was more specific (No. 78-1789 App. A, p. 97a):

"The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the

evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud."

**The Rate Schedule Contains No Provision for a Severable
Payment for Liquid Hydrocarbons.**

In spite of the positive statements to the contrary in Respondents' opposition to grant of certiorari, there is no provision in the Rate Schedule which would permit the grant of a judgment for residue gas, a separately calculated amount for extracted liquid hydrocarbons, and an increment in the price of the condensate produced by Respondents' wells.

The judgment which the Supreme Court of Louisiana directed to be entered (No. 78-1789 App. A, p. 94a), and which has indeed since the Supreme Court's decision been entered by the district court (No. 78-1789 App. C, p. 101a), is in an amount which is materially greater than the amount that would result from pricing the gas sold by Respondents to Petitioner at the well-head price provided by the Area Rate Ceiling order as contained in the Federal Power Commission's Opinion No. 607. This results from altering the Rate Schedule, which Respondents have done in their calculations in the guise of applying the so-called pertinent provisions of the comparability portion of the favored nation clause. Respondents' claims and calculations ignore the provision quoted below which provides for a wellhead price for the gas and the entrained liquids. Respondents claim a price for the "residue gas" and a separate price (claimed to be the amount paid to the government) for the extracted liquid hydrocarbons. This

necessarily assumes a change in Respondents' Rate Schedule, in violation of Section 4(d) of the Natural Gas Act which provides that "[U]nless the Commission otherwise orders, no change shall be made by any natural gas company in any . . . contract . . . except after 30 days notice"

Respondents state repeatedly in their brief that the Louisiana courts have held that the contract contains provisions for severable prices for the residue gas and the liquids; see their brief pages 17, 22-23, 24, 26, 27, 37-39. This statement is not so. In the district court the only reference to the whole problem was the statement in its opinion (No. 78-986 App. F, p. 36a) that

"The evidence demonstrates that the prices paid to the United States per MCF of gas was below the maximum area rate established in these orders, which means that the area rate schedule would not actually impose any limit under the facts of this case after October, 1972, but would prevent recovery before that date."

In the context this means that the only comparison in the district judge's mind was between the price established by the Rate Schedule and the contemporaneous royalty settlement for residue gas. In the Court of Appeal there is no reference whatever to the problem. The court merely stated (No. 78-986, p. 17a) that the contract "requires the interpretation that all pertinent factors necessary to properly equate the price of gas shall be given consideration and those specified are illustrative only." The Supreme Court made an even more casual reference to the problem (No. 78-1789, p. 94a) when it was stated in a footnote to its opinion that

"We note that plaintiffs make no claim that they would have been entitled to a price increase under

their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission."

The 1952 gas sales contract, Respondents' Rate Schedule in question here, contains the following provision:

"(B) The prices hereinabove in this Section 8 provided to be paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquefiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products, it being further understood and agreed, however, that nothing herein is intended to deprive Seller of the right to operate a standard type oil field separator at each well subject hereto in order to remove such condensate as may be thereby extracted prior to delivery of production hereunder to Buyer. The parties take cognizance of the fact that the aforesaid prices hereinabove provided to be paid are \$0.0025 per MCF higher than would have been provided had Seller retained the right to participate in the recovery of products by such processing operations subsequent to delivery, and accordingly the aforesaid prices have been calculated and agreed to by the parties with the intention and understanding that payment of the said prices shall constitute payment for all products whatsoever recoverable from the production delivered to Buyer hereunder."

There is absolutely nothing in the above provision, or in any other part of the contract, which would lead to the result that a separate sale of residue gas and of

extracted hydrocarbons contained in the gas was intended. Not one of the Louisiana courts has either understood or addressed the problem and the incautious statement contained in the order of the Federal Energy Regulatory Commission quoted in Respondents' brief is based simply, it appears, on the Respondents' assurance that the question has been decided by the Louisiana courts.

Even if it is correct, as Respondents' argument assumes, that the contract provides for a regulated price for residue gas and an unregulated price for extracted liquids, that fact would not justify the judgment which Respondents seek and which the district court has now rendered. Petitioner produced three hydrocarbon products under its grant of the lease on the government land: residue gas, extracted liquids, and raw condensate; it owed the government a royalty of 1/6 on each product. If Respondents' rate schedule is to be considered as a separate purchase at a separable price of each of the products, then logic would demand that the favored nation provision, having to do only with the purchase of gas, would have no effect on the contract price owed by Petitioner to Respondents for extracted liquids and condensate. Respondents' Rate Schedule provided for wellhead delivery of gas containing extractable liquids, and that price is subject to the area ceiling rates. If, as Respondents argue, the extractable hydrocarbons are sold separately, they are not covered by the favored nation provision.

In our argument we will comment further on these questions.

**There Is No Holding of Estoppel in the
Louisiana Supreme Court's Opinion.**

Respondents have based their argument in part on repeated assertions that the Louisiana Supreme Court has held that Petitioner is estopped to rely in this case on the provisions of Section 4 of the Natural Gas Act; see their brief, pages 30, 32, 36, 52. The opinion of the Supreme Court contains not one word on which these allegations can be based.

Respondents' Argument Assumes, As Did the Supreme Court of Louisiana, That if Respondents Had Filed With the FPC for Rate Changes, the Commission Would Have Permitted the Changes to Become Effective and Would Have Authorized Prices Limited Only by the Area Rate Ceilings Established by Opinions Nos. 607 and 607A.

Respondents' argument and the Louisiana Supreme Court's holding in giving effect, beginning in 1961, to the area rate ceilings established in Opinions Nos. 607 and 607A at 20.6¢ for wellhead deliveries in northern Louisiana completely overlook the fact that the FPC Area Rate orders were issued in October and November, 1971.

If Respondents had filed rate changes, the changes would have been filed in 1961, or at the latest in 1962, when payments of royalty at values higher than Respondents' prices were initiated. At that time and until 1971 there were no rate ceilings, but the Power Commission in passing on initial prices of duly filed contracts and changes proposed under the provisions of old contracts, relied on its Statement of General Policy 61-1, 24 FPC 818 (1960); it permitted, where contractually authorized, increased prices in north Louisiana up to 13.7¢ per Mcf. The Supreme Court of Louisi-

ana made two assumptions as to what the FPC would have done if Respondents had filed for the increased rates:

- (1) it assumed that in 1961 the FPC would permit the change to become effective by construing Respondents' Rate Schedule, providing for increases in case the buyer "purchased from another party seller at a higher price" to include royalty settlements, and
- (2) that it would have permitted the prices limited by the Area Rates approved by Opinion No. 607 issued ten years later.

Neither of these assumptions is either probable or legally permissible.

In this reply we propose to discuss the following:

- (1) The Louisiana Supreme Court's error in failing to follow the "Filed Rate Doctrine" and the error of Respondents' argument attempting to support that decision.
- (2) The Louisiana courts' lack of jurisdiction over the questions they have decided,
 - (a) interpretation of the gas sales contract as to the triggering of the favored nation provision, and
 - (b) the determination of specific rates for the sales of gas.
- (3) Alternatively to (b), the errors made by the Louisiana courts in their decisions on the federal questions described in (b) on which they passed.

The petition for certiorari in No. 78-1789 seeks review of the issue listed as (1) above, and the other two issues are covered by No. 78-1789 and also by No. 78-986.

**THE JUDGMENT OF THE SUPREME COURT OF LOUISIANA
IS IN VIOLATION OF THE FILED RATE DOCTRINE.**

The Supreme Court of Louisiana in its opinion (Appendix, Petition for Certiorari, No. 78-1789, pp. 83a, et seq., 92a, 93a) accepted as the law of the case the decision of the Louisiana Court of Appeal that the favored nation price increase was activated by the royalty payment to the federal government; and held that Petitioner, by failing to notify Respondents of the increase, even though it was free of bad faith and fraud, excused Respondents from the condition requiring them to file for the rate increase with the Federal Power Commission. The court reached its conclusion by applying article 2040 of the Louisiana Civil Code, excusing compliance with a contractual condition where the compliance was prevented by an act of the other party to the contract; even though it failed to notice that the condition was not one imposed by the contract, but rather was a requirement of federal law.

Respondents' argument attempting to support this holding is contained in pages 35 to 54 of their brief in opposition; the introductory summary of their argument on pages 35 to 37 relies upon (1) "well established rules and fundamental principles of law, equity and justice," (2) an assertion that Petitioner is *estopped* from relying on its own wrongdoing and concealment of the facts, and (3) that failure to sustain the judgment would lead to unjust enrichment of Petitioner at Respondents' expense.

As we have pointed out in our restatement above, the opinions of the Louisiana courts contradict the Respondents' assertions of concealment and estoppel. As to Petitioner's supposed unjust enrichment, Respondents have referred to no fact which would alter the prevailing rule applicable to utilities, such as Petitioner, that permits, even requires, them to recover their expenses, including purchased gas, in the rates charged to their customers. Respondents' argument also overlooks the fact that the "relevant public interest" in the price of gas sold by interstate gas sellers is not to be found in Respondents' assertions, nor in the decisions of the courts of the State of Louisiana, but rather by the Federal Energy Regulatory Commission in accordance with the Natural Gas Act.

Respondents' argument (brief pp. 37, et seq.) also assumes, contrary to the fact, that the recovery directed by the Supreme Court of Louisiana, as now contained in the judgment rendered by the trial court (No. 78-1789 App. C, p. 101a) is within the Commission imposed limits. The judgment is for amounts for each of Respondents far exceeding those limits, a result attempted to be justified by Respondents on the ground that the Louisiana courts have held that the contract provides severable prices for "residue gas" and "extracted hydrocarbon liquids." The Louisiana courts obviously did not understand the problem, and nothing in the opinion of either the Court of Appeal or the Supreme Court of Louisiana indicates they intended to do what Respondents attribute to them; this brief, pages 9 to 11.

The Solicitor General has placed in an appendix to his brief the order of the Federal Energy Regulatory

Commission entered May 18, 1979, declining jurisdiction in this case, and Respondents' brief contains several quotations from that order even though the order is not final. In footnote 19, Appendix to Solicitor General's brief, page 14a, the Commission stated:

"The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate."

We are not able to find any support for the finding attributed to the proceedings in the Louisiana courts.

Respondents' brief makes no attempt to rebut the application to this case of the filed rate doctrine, which is discussed in the petition for certiorari herein, pages 10 to 15. We also note that both the Federal Energy Regulatory Commission and the Solicitor General in his brief to this Court (filed in response to this Court's request in No. 78-986) agree that the Louisiana Supreme Court's judgment cannot stand, as being in conflict with the filed rate doctrine. In its order above referred to (Solicitor General's brief, App. p. 13a), the Commission said:

"It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of *certiorari* has been filed in the Supreme Court of the United States

seeking review of the Louisiana Supreme Court's decision. *Arkla v. Hall*, Sup. Ct. No. 78-986, filed December 18, 1978."

In conclusion on this branch of the case, we quote the final paragraph of the Solicitor General's argument, brief pages 16-17:

"In our view, the Supreme Court of Louisiana erred in holding that respondents must be deemed to have applied for the necessary rate increases between 1961 and 1972, and that the Commission would have allowed the increases. Even assuming, for the sake of argument, that Arkla's conduct prevented respondents from filing for the rate increases because they were not informed of the lease payments to the United States, this does not override the supervening requirements of the Natural Gas Act's rate filing provisions. See *e.g.*, *Northern Natural Gas Co. v. Kansas Corporation Commission* [372 U.S. 84 (1963)]. The *Montana-Dakota* case itself rested upon claims that filed rates claimed to be unreasonably low were a product of fraud. But this allegation did not avoid the filed rate doctrine. The Louisiana Supreme Court's erroneous decision, however, is not the subject of the present petition."¹³

"¹³ As we have noted, page 10, *supra*, Arkla has recently filed a petition for a writ of certiorari to review that decision. While we believe that the decision of the court of appeal, of which the instant petition seeks review, is correct with respect to the issues of the Commission's primary jurisdiction and the filed rate doctrine—and therefore does not warrant this Court's review—the Court may consider it appropriate to defer consideration of the instant petition until it considers the most recently filed petition and the responses thereto. Moreover, while our position here is based on the Commission's decision of May 18, 1979, it should

be noted that that decision is, under the Natural Gas Act, subject to reconsideration by the Commission, and to judicial review in the federal courts of appeals. See note 10, page 10, *supra*."

**THE LOUISIANA COURTS DO NOT HAVE JURISDICTION OF
THE QUESTIONS PRESENTED BY THIS LITIGATION.**

Petitioner's application for certiorari to the judgment of the Louisiana Court of Appeal, No. 78-986, filed in this Court in December, 1978, specified as a ground for grant of certiorari Petitioner's claim that the Louisiana court did not have power to interpret authoritatively the favored nation provision of Respondents' Rate Schedule (Section 8(D) of the 1952 contract), nor to determine what the price or rate for the gas sold by Respondents should be. That same question of jurisdiction recurs in this case and is specified in the present petition, No. 78-1789. Those questions should have been referred by the Louisiana court to the Federal Power Commission.

Respondents' reply to this ground of the petition for certiorari (their brief pp. 11-15) is completely unfocused. This suit, insofar as this ground of alleged error is involved, is concerned entirely with (1) interpretation of a Federal Power Commission Rate Schedule and (2) determination of the price of interstate gas under the Rate Schedule, both questions at the very heart of the Commission's administration of the Natural Gas Act.

In response Respondents cite cases having to do with various collateral and incidental questions arising under natural gas sales contracts. "Jurisdiction" is a word of many shades of meaning: jurisdiction to determine whether a price was escalated by a contract provision,

and what the escalated price should be, is one thing; jurisdiction on removal from a state court (one of the decisions referred to by Respondents) is quite another, as are most of the decisions cited by Respondents.

"Petitioner's Reply to Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae*" filed in No. 78-986 on June 13, 1979, contains a specific and reasoned argument as to why the State was required to disclaim jurisdiction in this case.³ We do not have anything to add to our argument there, and this argument has not been answered by Respondents; pages 4 to 28 of that brief.

**THE STATE COURT DECISIONS INFRINGE ON THE
COMMISSION'S REGULATORY RESPONSIBILITY
UNDER THE NATURAL GAS ACT.**

In the restatement contained in this brief (pages 1 to 14) we have pointed out the lack of support in the opinions of the Louisiana courts for Respondents' assertion in their brief that the lower courts decided that the Rate Schedule provided for severable payments for extracted liquid hydrocarbons and for residue gas. In their brief (page 25) Respondents say that the recovery supported by the evidence in the case is apportionable 45% to the extracted liquids and 55% to residue natural gas; that is, that approximately one-half of the judgment they have now obtained in the district court (No. 78-1789 App. C, p. 101a) is not for gas but for extracted liquids.

³ The Federal Energy Regulatory Commission's order is or will be before the Court of Appeals for the District of Columbia Circuit.

The lack of legal and factual support for Respondents' claims in this respect—without doubt a question arising under the Natural Gas Act and the regulations of the Commission—is fully discussed in our reply to the Solicitor General's brief, filed June 13, 1979, in No. 78-986, pages 28 to 31, and will not be repeated here.

We do call attention to the fact that Respondents' claim for the additional payment for extracted liquids is based upon the provision of the favored nation clause for comparison of all pertinent provisions of the Respondents' sales contract with the provisions of the subsequent contract by which Petitioner has allegedly bought gas at a higher price. The subsequent contract being compared is not a purchase contract but is an oil and gas lease, providing for royalties based upon the value of a fraction of the total production of oil, gas and extracted hydrocarbon liquids. The fact that Petitioner paid a separate royalty at a higher value on extracted liquids is irrelevant in evaluating the price it paid for dry gas. If indeed the Rate Schedule is severable as to the settlement for the two products, then the escalation provision as to gas would have no effect upon the provisions of the oil lease for royalty settlements on extracted liquids.

CONCLUSION.

The judgment of the Supreme Court of Louisiana which is applicable to that part of the gas sold under Respondents' Rate Schedule prior to the date they are alleged to have secured an exemption from filing as small producers, sought to be reviewed in No. 78-1789, should be summarily reversed; and the judgment of the Louisiana Court of Appeal should be reviewed by this Court on certiorari in No. 78-986.

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